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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-616

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, ET AL.,

Respondents,

vs.

THE VILLAGE OF ARLINGTON HEIGHTS, ET AL.,

Petitioners,

NORTHWEST OPPORTUNITY CENTER AND ELUTERIA D. MALDONADO,

Intervening Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

The respondents herein have offered a purported statement of the case which is not only inaccurate and misleading, but which in effect seeks to argue the merits. Although it is difficult to separate the argument from the facts as set forth in the respondents' brief, it is necessary to correct some of the more glaring errors.

The respondents accuse the petitioners of a series of misstatements and exaggerations, without bothering to indicate a single

example. They assert that the Village's zoning has no integrity and has not been consistently applied. In citing the Court of Appeals' opinion, they even misstate the opinion which is the subject matter of this proceeding. The Court of Appeals at page 412 points out "that the evidence does not necessitate a finding that Arlington Heights administered this policy in a discriminatory manner." At page 415 the Court of Appeals does not question the integrity of the zoning, but simply incorrectly applied the "compelling interest" test and determined that the zoning ordinance failed to meet this test. The trial court specifically found that the defendants were motivated with respect to the property in question by a legitimate desire to protect property values and the integrity of the Village's zoning plan. 373 F. Supp. 208, 211. This finding was not disturbed by the Court of Appeals' opinion.

The Village is being asked to "plan for" multiple-family development on the subject property by changing the long-established single-family classification which is totally consistent with surrounding land uses and zoning. There is absolutely no evidence in the record of any exploitation of local segregated housing patterns by the petitioners. Instead, the evidence indicates clearly that the Village zoning ordinance has permitted the development and planning of thousands of multiple-family dwellings, as well as single-family dwellings in appropriate places throughout the Village. The Village's housing pattern, which has been established by the market, still encompasses almost 200 poverty families (Rec. 481) and the respondents' own evidence indicates that, based on 1970 census data, more than 3,000 blacks could afford to live in the Village and 473 black households could rent housing in the Village based on economic data revealed by the census. These figures did not even take into account possible movements from existing single-family homes outside the Village to apartments in the Village, or movements from apartments outside the Village to single-family homes in the Village. The respondents' own evidence also showed that

2,500 blacks who would be eligible for Lincoln Green housing would also be eligible for other housing in the Village. (Tr. 595) The evidence also indicates that this selfsame Village Board approved a report that recommended the development of 150 to 250 units of moderate-income housing and 50 units of low-income housing in the Village. (App. I, 68)

The respondents also do not mention that the Answers to Interrogatories filed by the petitioners in this case also reveal that the Village has entered into a cooperation agreement with the Housing Authority of Cook County to provide low-income housing for the elderly, and that in fact such housing has been approved and is about to commence construction in the Village. (Answers to Interrogatories, No. 36) The trial court refused to admit into evidence the Village's Fair Housing Ordinance adopted in January of 1968 on grounds of relevancy, but the response to interrogatories also indicates the adoption of such ordinance. (Answers to Interrogatories, No. 40)

In fact, the minutes of the Plan Commission received over objection of the Village indicate that the motion made with respect to the application of the respondents was that it "be denied, as it is a request for spot zoning. While the need for low and moderate income housing may exist in Arlington Heights or its environs, the Plan Commission would be derelict in recommending it at the proposed location." (Plf. Ex. 17)

These unquestioned facts, well known to the respondents, hardly justify the intemperate characterizations directed against the Village. In fact there is no evidence in the record that the action of the municipality in any way has racially discriminatory effects. The most that the respondents have been able to demonstrate is that, based on census figures blacks represent 40% of the eligible applicants for housing which was proposed to be built. The respondents were unable to produce a single black citizen whose income fell within the range or who could be proven to be an occupant of the housing once built. There was

no evidence in the record with respect to the two blacks who originally were plaintiffs, but who actually lack standing, which indicated either that they were eligible for the Lincoln Green project or that they would in fact reside in the project.

Even if it be assumed that a racially discriminatory effect would warrant setting aside the otherwise valid and long-standing single-family zoning on the subject property, which contention we strenuously deny, it is clear that the respondents have fallen far short of showing any racially discriminatory effect of the action complained of here. It comes with little grace to argue on the one hand that blacks would represent 40% of the eligible applicants for 190 units and therefore the Village's action was discriminatory, while it is the respondents' own evidence that some 2,500 of the blacks who would be eligible for Lincoln Green housing are also eligible for other existing housing in the Village—such housing actually built under the existing zoning ordinance.

There is no question that the zoning ordinance has been amended many times to permit multiple-family developments. There is no evidence that all of these or any of them were "high rent apartments." The evidence is clear, as recognized by both the trial court and the Court of Appeals, that the Village has generally adhered to its apartment policy with respect to zoning changes. If the Village had not made zoning changes in order to accommodate multiple-family construction where such construction met proper planning criteria, undoubtedly these respondents would be complaining that the Village was practicing exclusionary zoning by refusing to allow development of multiple-family dwellings within its corporate limits. *Cf., United States* v. *City of Blackjack*, 508 F. 2d 1179 (8th Cir. 1974).

Totally ignored by the respondents is the fact that the Village on at least 39 occasions rejected applications for multiple-family zoning which, like the application in the instant case, did not meet planning criteria for such rezoning. The most that can be said for the respondents' position is that if the Village had been

willing to ignore all basic zoning criteria and spot zone the subject property, at the expense of the neighbors and the destruction of the Village's plan, possibly 190 low and moderate income families could occupy the site. There is no evidence that any of these families would be black, nor is there any evidence that any of these families would be white. The Village's decision was in fact "colorblind" and the unwarranted and totally unsupported assertions of the respondents of racial bias simply do not find any support in the record or in fact.

Background of MHDC.

The respondent MHDC in its brief indicates that it has developed scores of apartments and houses made available to minorities under federal subsidy programs. This statement hardly squares with the evidence in the record. Mr. Kane, Director of Real Estate, testified that they had constructed 37 single-family homes in South Elgin and had rented three or four others. (Tr. 56) The only application ever made for rezoning in the northwest suburban community was the subject property. (Tr. 74)

The respondents do not inform this Court that the only multiple-family development which MHDC had ever constructed was the 212-unit development known as Rand Grove Village located in Palatine Township and mentioned in the respondents' brief. What the respondents do not tell this Court is that Rand Grove is three quarters of a mile from the corporate limits of Arlington Heights. It is located on property properly zoned and was developed without objection or interference of any kind on the part of the Village of Arlington Heights or any of the other surrounding communities.

This hardly qualifies MHDC as a substantial force in the housing market or the northwest suburban community area of which Arlington Heights is a part, as a provider of low and moderate income housing.

While the respondents indicate the benefits of the 236 program and discuss the income limitations, they do not tell the

Court that at the time of trial, some two years after their application was denied at the local level, the respondents had never applied for a 236 commitment. (Tr. 273) The trial court found in fact that federal funding for the project was not available. 373 F. Supp. 208, 211.

In describing the proposed plan for Lincoln Green having a density of 13 units to the acre, the respondents do not mention the fact that this density is more than three times the R-3 density which applies to all the surrounding single-family area. To assert that a multiple-family development of 13 units to the acre is similar to neighboring houses in all material, physical respects is blatantly misleading.

Totally ignored is the testimony of Rolf C. Campbell, a zoning and planning consultant, who testified for the Village that the proposed development would be adverse to adjacent property owners and would adversely affect the livability of the single-family residences. (Tr. 876) Campbell's opinion of adverse effect was based upon the plan that the respondents had submitted to the Village, which was in evidence. His opinion with respect to the effect on the surrounding areas had nothing to do with the character of the persons who would be residing in the development. (Tr. 882) Campbell testified that ground coverage for single-family homes is almost always a higher percentage than ground coverage in multiple developments. (Tr. 884) He testified as to his work as a consultant on several amendments to the Comprehensive Plan first adopted in 1959. His work took place in 1961, 1962 through 1966, 1967 and 1968. He testified that the decision of the Village in rejecting the Lincoln Green proposal was consistent with the recommendations of the Comprehensive Plan. (Tr. 888)

Also ignored was the testimony of the Village Planner, Joseph Kesler, that the actual density of the land utilized for residential purposes in the proposed plan was 15 units to the acre. (Tr. 783) Kesler was of the opinion that the proposed development would have a detrimental effect on the surrounding area from a

planning standpoint. (Tr. 788) He testified that at the time of the application, traffic conditions along Euclid Avenue were hazardous and the number of trips per day to be generated by the project would be higher than if the land was used for single-family purposes. (Tr. 793) In Kesler's opinion, the highest and best use of the subject property was for single-family homes in view of the character of the surrounding area. (Tr. 805)

Also ignored in the respondents' description of the Lincoln Green plan and its impact on the neighborhood was the testimony of F. Gregory Opelka, a professional real estate appraiser and Vice-President of Fairfield Savings & Loan Association. He testified that the subject property adjoins the rear yards of single-family homes that run from Euclid to Oakton. These homes range in value from $50,000 to $70,000. The majority were built in the last 10 years; some are newer. (Tr. 914) Across from the high school on Oakton, the homes were built in the last few years and some new homes are under construction. (Tr. 915) West of the subject property are homes, many of which were developed in the 1940's and 1950's. To the south are single-family homes in the $30,000 to $40,000 range, built in the late 1940's and 1950's. On Euclid Avenue across the street from the subject property are homes, some of which were built in the last 5 to 10 years. (Tr. 916)

Opelka testified that the proposed development will diminish the value of the properties in the immediate area and in other parts of the Village. (Tr. 931) This range in negative effect on the single-family homes would be between 5% and 10% of their value, with the most severe effect on the properties adjoining the subject property on the east. (Tr. 931) He testified that this was a completely developed area, except for the high school property, and that people who buy in a completely R-3 area have a right to rely on the land use and zoning. (Tr. 932) People have a right to rely on the plans of municipalities for this type of protection. Opelka testified that his opinion would be the same if the property were developed as proposed with

totally private financing, and no matter what price range or rental range the R-5 development would have. (Tr. 935)

Mr. Drummond's alleged "expertise" can best be measured by the fact that he had had no experience with a 236 project that had been actually built and had done no previous planning studies in Arlington Heights. He conceded that the whole area in which the subject property lies has been developed in accordance with the official plan of 1959, and that the proximity of Euclid Avenue does not inhibit the development of single-family homes on the subject property. (Tr. 423) Drummond also testified that practically all the way from the eastern boundary of Arlington Heights to Northwest Highway on the west, Euclid Avenue is developed with single-family homes and this is the predominant land use on both sides of Euclid. (Tr. 424) He saw nothing different about the subject property from the land which had been developed for single-family use along Euclid Avenue.

Drummond also testified that he had no knowledge of what was economically feasible in Arlington Heights in 1971, and had had no experience with single-family home development in a builtup community such as Arlington Heights. (Tr. 433) He testified that R-5 Districts are used as buffers in Arlington Heights between single-family areas and manufacturing and commercial uses. (Tr. 439) In his opinion it was not unusual to plan along those lines. (Tr. 441)

Drummond conceded that there would be more automobiles in the morning rush hour from the proposed project than if the land were developed for single-family purposes. When he characterized the proposed development as comparable to single family, he meant only that a developer who was formerly serving that portion of the single-family market was now offering townhouses or condominiums. (Tr. 451) He concluded that the site was just as desirable for single-family use as for the proposed development. (Tr. 456)

Thus, the characterization in the respondents' brief of Drummond's testimony is highly inaccurate since he conceded that single-family homes were equally well suited for the subject property, and his definition of compatibility had nothing to do with the use of the land, but rather the character of the builders in the market.

Reference is made to a purported tax impact study. This study supposedly shows that the development would make a net contribution to the Village and to the Arlington Heights schools in terms of tax revenue. The law of course is clear that municipalities are not required to formulate zoning requirements based upon discouraging families with children or with reference to the revenues to be derived by the school district. *Cosmopolitan National Bank* v. *Mount Prospect*, 22 Ill. 2d 463, 468-69 (1961). Moreover, the tax study was produced based on figures prepared by a John Ducey who did not testify in the case.

The validity of the tax impact study may be gauged by the fact that Ferrara, who had supposedly modified Ducey's figures because he didn't agree with the number of children that Ducey thought would be produced, testified that he had not studied the assessed valuation of the property involved in the study and did not know the assessed valuation of the project if it should be completed.

In this instance, as in several others, throughout their brief, the respondents, like the Court of Appeals, made use of evidence that had been objected to and had been introduced for a limited purpose only. The first 40 plaintiffs' exhibits were documents which had been prepared by MHDC and were in the possession of the Village Trustees at the time they made their decision at the local level. They were introduced over objection of the Village and admitted solely for the purpose of showing that the documents were in the hands of the Trustees and not for the truth of the matters purportedly contained within them. (Tr. 158, 194)

In most instances the respondents made no attempt during the course of the trial to support the exhibits by the testimony of those persons who prepared them. Thus, the Village was denied the right to cross-examine or to inquire into the validity of the exhibits. Nevertheless, the respondents now seek to argue the substance of these exhibits as if the matters contained had in fact been proven during the course of the trial.

For example, reliance is placed upon a traffic report prepared by Barton Aschman Associates and identified as Plaintiffs' Exhibit 13. No one from Barton Aschman appeared to testify in support of that report, and the reference to the transcript contained in the respondents' brief simply indicates that the study had been commissioned by MHDC. Yet, the respondents now argue the substance of the consultant's report.

This is the pattern exhibited throughout the respondents' brief. They, for example, argue extensively from a study issued by the Cook County Office of Economic Opportunity. This exhibit, again admitted over the Village's objection, was not verified by anyone who made the study, and the Court permitted its admission only for the purpose of showing that it was before the Village Board and not for the truth of the assertions. Yet, the Court of Appeals apparently relied upon this document.

MHDC contends that it had consulted with the staff of the Village for preliminary review of the proposed development. Such consultation of course goes on for every application for zoning change and in no way is controlling on any of the issues in this case. What is of great significance is the testimony of the Village Planner, Mr. Kesler, that he, like Hanson the Village Manager, offered his assistance to MHDC after the hearing in finding other sites, but MHDC never used his services. (Tr. 773)

Reference is made to the self-serving exhibits designated as Plaintiffs' Exhibits 20, 21, 22, 27 and 35. These exhibits were not substantive in any manner and simply admitted for the purpose of showing that they were before the Board of Trustees at the time of action.

The claim that the questions raised by the Plan Commission were promptly resolved by MHDC simply is contrary to the fact that MHDC insisted upon what the Plan Commission found to be spot zoning, and then refused to accept the Village Planner's offer of assistance in seeking alternative sites.

The Need for Low and Moderate Income Housing.

In arguing a need for low and moderate income housing, the respondents rely on a Village report adopted after the hearings in question, which recognized the need for some units of moderate and low income housing. In their brief the respondents argue that their decision was made upon a study by the Institute of Urban Life, which was admitted in evidence as Plaintiffs' Exhibit 18. Here again, its admission was over objection of the Village and it was admitted for the limited purpose of showing that it was one document which had been presented by MHDC at the hearing and subsequently submitted to the Board of Trustees. No effort was made to introduce any testimony by the Institute of Urban Life to support the findings of that study, which of course encompasses areas well beyond the Village of Arlington Heights. The Court of Appeals apparently again relied upon this study, failing to note the limited purpose for which it had been admitted in evidence and the failure to support the study by qualifying testimony.

Again, Ferrara testified to a market study that he had made. This study had consisted of an inquiry of 900 people; 173 were eligible for 236 housing, and 25 of those were residents of Arlington Heights. Ferrara did not know whether low and moderate income housing was available in the towns where the other eligibles lived. (Tr. 293) He had not made a survey to determine whether the eligibles desired to live in the kind of housing proposed by MHDC.

Thus, the evidence as to need for low and moderate income housing in the Village of Arlington Heights is sketchy at best and has, in any event, no relationship to racial composition.

The fact that the Village has rezoned 60 parcels of land for multiple-family development indicates the desire of the Village to produce a multiplicity of housing types and to accommodate different lifestyles within the community. The fact that some of these projects are adjacent on one side to single-family homes indicates merely that multiple-family developments are used as buffers under appropriate conditions. No reference is made in the respondents' brief to the numerous rejections by the Village of multiple-family developments of an unsubsidized nature when the location was inappropriate.

The only other 236 project ever submitted in Arlington Heights was actually withdrawn before it was ever presented to the Village Board. (Tr. 853) There is no evidence that the petitioners have approved rezoning for 90% of the apartment developments proposed to be built in the Village. The evidence with respect to the rental range for apartments indicates that apartments are available as low as $160.00 a month. (Tr. 777)

Contrary to the statement in the respondents' brief, there is no evidence that there are not units available that persons of moderate income can afford. The respondents' references to the transcript simply do not support the assertions made in their brief.

Residential Segregation in the Arlington Heights Area.

As previously indicated, the testimony of Pierre deVise at best shows that 3,244 blacks could afford housing in Arlington Heights based on the 1970 census figures with respect to income and housing. If a substantial number of blacks do not reside in Arlington Heights, therefore, it is not the result of the zoning pattern or even the economics of the market place, but rather for reasons known only to black home seekers and to other factors clearly not related to the Village's zoning function. 373 F. Supp. 208, 210.

The statements made with respect to respondents, Guthrie and Ransom, who were employed at the Honeywell Plant

simply are not related to the issues in this case. As we shall indicate below, there is no evidence that either would qualify for the MHDC project. One is a homeowner in Chicago; the other occupies a home in Evanston. 373 F. Supp. 208, 210.

It is not true that no black workers have been able to find housing they can afford in Arlington Heights. The record nowhere so indicates and the testimony of Mr. Ransom at page 322 was properly stricken. Guthrie conceded in fact that he had never actually sought out any housing from any realtor in Arlington Heights. (Tr. 221)

Again, most of the respondents' argument under this point in their Statement of Facts is based upon exhibits prepared by the Office of Economic Opportunity and the Urban League, and which were admitted solely for the purpose of showing that they were before the Village Board at the time of decision and not for the truth of the facts therein stated. No representative of the OEO or the Urban League was present to testify or verify in any respect the substance of these exhibits. Yet, these totally unverified exhibits became the basis for the Court of Appeals' conclusions.

The Effect on Minorities of the Rejection of the MHDC Development.

Respondents argue that the refusal to permit construction of Lincoln Green will be to virtually maintain the all-white housing patterns of Arlington Heights and deprive non-white citizens of housing and employment opportunities. There is of course no evidence in the record to support this conclusion. The citations to the transcript simply do not bear out this conclusion. The testimony of Mr. deVise, upon which much of the respondents' argument is based, is simply that "blacks make up about 40% of the potentially eligible population for moderate income housing in the SMSA. . . ." (Tr. 592)

There is actually no evidence to show any relationship between the rejection of the MHDC development and the racial character of the Village of Arlington Heights. The Court of Appeals' conclusion that, if Lincoln Green were built it would be an integrated community, is not based upon any evidence. Since there could have been more than 3,000 blacks residing in Arlington Heights based upon the 1970 census figures without the MHDC development, it is difficult to conclude that the building of the MHDC project would in any way change the racial composition of the community. Moreover, this argument ignores the basic fact that what is at issue here is not racial discrimination in any manner, but simply a refusal to alter a valid and existing zoning pattern so that people of low income can occupy property they would otherwise not be able to afford.

There is no need for any signal that the Village of Arlington Heights is no longer closed to blacks. The Village has never been closed to blacks, and there is no present or future intent to ever attempt to close the Village to blacks or anyone else.

There is no demonstrable effect on minorities which arises from the rejection of the MHDC development. As we have indicated in our original brief, the mere fact that a valid police power regulation might have a greater impact upon poor people or a minority group does not invalidate that regulation. The highly emotional and totally unsupported allegations which appear in the Statement of the Case presented by the respondents cannot fill the absolute void of evidence which occurs in this case as far as the respondents are concerned.

The Village Hearings and the Community Response.

The respondents in thier brief attempt to create out of whole cloth a fabric of racial bias in the history of the hearings before the Plan Commission and the Village Board. The evidence clearly does not support any such characterization. There is no evidence that the Commission or Trustees were "besieged with

advice on the social issue." In any event, the trial court specifically found that the decision was not based on any racial motivation, and the Court of Appeals refused to disturb this finding. As a matter of fact, neither opinion indicates that the Court took seriously this totally unsupported claim of racial bias in the hearings below.

The fact, if true, that certain of the objectors might have been motivated by racial factors of course does not either imply that such considerations influenced the Village officials, or in any way affect the validity of the proceedings before the Village Board. *Ranjel* v. *City of Lansing*, 417 F. 2d 321 (6th Cir. 1969).

The fact that the respondents were able to come up with two or three letters to a local newspaper from a town of almost 70,000 of course does not demonstrate any racial bias upon the part of the Plan Commission or the Village Board. While certain of the homeowners filed petitions in opposition to the project, the respondents concede that there were also staunch supporters, including church groups and the League of Women Voters, and that, in fact, petitions in support of the proposal were received and considered as well as those of the objectors.

The so-called emotional racial reactions on the part of overflowing crowds simply are figments of the respondents' imagination. The references to the transcript simply indicate that the hearings were well attended and that there were staunch partisans on both sides. Significantly, Joseph Kesler, the Village Planner who attended the meetings of the Plan Commission, testified that there were similar meetings on other projects attended by just as many people, and that these were usually meetings or hearings which involved multiple-family projects. (Tr. 112-113)

The ability to cite three letters to the editor and one letter to the Plan Commission and Village Board hardly demonstrates the kind of bedlam and racial antagonism that the respondents would like this Court to believe took place. As a matter of fact,

the testimony of Mrs. Harms, the only Trustee actually called by the respondents, was that she had received a total of one letter in opposition to the project. (Tr. 168)

To equate this evidence, if it can be dignified by calling it such, with the situation in the *Dailey* case simply indicates that the respondents have lost touch with reality. The opinion in *Dailey* v. *City of Lawton*, 425 F. 2d 1037 (10th Cir. 1970) was based upon specific findings by the District Court that the actions of the planning commission and city council were a direct result of the bias and prejudice on the part of the owners of other property in the North Addition, which was carried over to members of those bodies. There were further findings that the motivation for the denial of the zoning change was to keep a large concentration of Negroes and other minority groups from living in the North Addition. The evidence in *Dailey* noted that the racial situation was discussed in connection with the circulation of the petitions, and that the sponsors had received anonymous phone calls opposed to the project on a racial basis. A member of the planning commission testified that the opposition was based on racial bias. 425 F. 2d 1037, 1039.

No such evidence is present in the record in this case and no such findings were made by the trial court. In fact, the trial court here specifically found that the action of the Village Board was not racially motivated.

An examination of *Kennedy Park Homes Asso.* v. *City of Lackawanna*, 318 F. Supp. 669, and *United States* v. *City of Blackjack*, 508 F. 2d 1179, also shows no relationship between the factual situation there and what transpired in Arlington Heights.

The objections of the property owners presumably were based on the opposition to multiple-family zoning usually expressed by single-family homeowners when a project with a density of three times the existing density is proposed to be inserted in the midst of a prime and well-established single-family area. It is indeed ironic that in the body of their brief, the respondents

argue that what this Court should consider is the effect of the decision and not the motivations of those who made the decision. Yet, in their Statement of the Case, the respondents would attempt to convince this Court that, contrary to the facts and the evidence, the Village Board was motivated by racial bias.

The Proceedings Below.

As indicated in the respondents' brief, much of their case on the trial was based upon their own exhibits which were admitted for the sole purpose of showing that they were before the Village Trustees when the development was rejected. In the Court of Appeals and in this brief, the limited purpose for which those exhibits were admitted is being stretched to indicate that somehow or other the substance of those exhibits were proven at the trial.

The respondents' brief of course fails to indicate in any manner the nature of the evidence adduced by the Village during the course of the trial. That evidence included the expert testimony of the Village Planner, Mr. Kesler, the zoning and planning consultant, Mr. Campbell, the real estate appraiser, Mr. Opelka, Trustee Alice Harms, and Planning Engineer, John Best. All is ignored in the respondents' brief.

The respondents also fail to note the numerous examples of rejection of other improperly located multiple-family developments. Nowhere is there any evidence of any "tremendous" need for low and moderate income housing in Arlington Heights, nor do the respondents remind this Court that there are only a half dozen communities in the Chicago metropolitan area with more than 50,000 residents.

Contrary to the allegations contained in the respondents' brief, the record does not demonstrate that there were no other suitable sites for low and moderate income housing in the Arlington Heights area. In fact, MHDC's only other multiple-family development, Rand Grove Village, is located three-

fourths of a mile away from the corporate limits of the Village of Arlington Heights.

Mr. Kane admitted that the subject property could be developed for single-family homes under the present zoning under Section 235 federal funding if the land could be bought for $200,000 instead of $300,000, and that the cost of the land was the only impediment to single-family development. (Tr. 54) Kane further testified that two sites in Arlington Heights were rejected because they were a mile or a mile and a quarter away from shopping facilities. He rejected other sites because of the purported distance from schools and shopping facilities. As a matter of fact, Plaintiff's Exhibit 56 shows the nine possible sites were rejected out of hand because they were thought too remote or too far from convenience shopping centers or too closely surrounded by single-family homes.

Despite Mr. Kane's testimony that he rejected these sites because of the distance from schools and shopping, the fact of the matter is that the Rand Grove facility is two miles away from the nearest shopping facility and two miles away from the nearest school.

One of the five possible sites was rejected because no reply had been received from a telephone call and letter; several of the remaining four were rejected because of price, although there is no evidence of any direct attempt to negotiate the acquisition of any other site. Significantly, the Village Manager had initially met with Mr. Kane to suggest sites available in the community, and Mr. Kesler's willingness to meet after the hearings to suggest other sites was totally ignored.

The lack of evidence that the respondents really did not seek alternate sites in an area which would be more appropriate for multiple-family zoning is reflected in Chief Judge Fairchild's dissenting opinion, where he says:

> "A review of the record reveals that, at the time of the Village's decision to deny the variance, there were at least nine undeveloped tracts of land in excess of fifteen acres zoned R-5 (multi-family housing). The record does not contain a sufficient showing by plaintiffs that it was not reasonably possible to construct the proposed project on one of these sites." 517 F. 2d 409, 416.

In fact, as indicated, Plaintiffs' Exhibit 56 indicates that these nine sites were rejected without any extensive investigation. Thus, the contention of the respondents that there were no economically feasible and suitable alternate sites simply is not supported by the record. In the course of cross-examination, Kane indicated that two of the sites were rejected because they were a mile away from shopping. (Tr. 62) It was his position that all the developments had to be within one mile of shopping facilities (Tr. 63), although, of course, their existing project, Rand Grove, did not meet that requirement. Kane also testified that he personally had contacted only one broker or owner of alternative parcels. (Tr. 69)

ARGUMENT.

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONERS' REFUSAL TO PERMIT THE CONSTRUCTION OF LINCOLN GREEN VIOLATED THE FOURTEENTH AMENDMENT.

A. The Record Fails to Show That the Petitioners' Refusal to Permit the Construction of Lincoln Green Was Racially Motivated.

The trial court specifically found that the plaintiffs failed to carry their burden of proving discrimination by defendants against racial minorities. 373 F. Supp. 208, 210. The Court of Appeals refused to set aside this finding of fact. It specifically found that the evidence did not support a finding that Arlington Heights administered its zoning policy in a discriminatory manner. 517 F. 2d 409, 412. Yet, the respondents in their brief somewhat hysterically maintain their unsupported allegation that the petitioners' refusal to rezone a 15-acre tract, located in the midst of a single-family area, to permit multiple dwellings at three times the single-family density, was racially motivated.

This Court has repeatedly held that, even in a civil rights case, the motivations of municipal officials are not subject to judicial inquiry. *Palmer* v. *Thompson,* 403 U. S. 217 (1971), 20 L. ed. 2d 438; *United States* v. *O'Brien,* 391 U. S. 367, 383 (1968), 20 L. ed. 2d 672, 683; *Detroit United Railway* v. *Detroit,* 255 U. S. 171 (1920), 65 L. ed. 2d 570; *Hing* v. *Crowley,* 113 U. S. 708 (1884), 28 L. ed. 1145, 1147.

Despite their repeated assertions, the respondents fail to point out anything in the record which is susceptible of showing racial motivations on the part of the Village Plan Commission

or the Village Trustees. The fact that the public hearings were well attended and frequently emotional does not prove racial motivation on the part of Village officials. As Mr. Kesler pointed out, zoning hearings involving proposed multiple-family rezoning petitions frequently have produced larger crowds and extreme emotions. The fact that the respondents are reduced to talking about two or three letters which appeared in the newspaper falls far short of proving any racial bias or motivation on the part of Village officials.

The fact that the Village President noted that there was community opposition to the proposed rezoning certainly is no indication of racial bias on the part of President Walsh or anyone else. As a matter of fact, Walsh himself proposed assistance in seeking other sites, and the Village Planner, as well as the Village Manager, made themselves available for such purposes.

The citation of the case of *Dailey* v. *City of Lawton,* 425 F. 2d 1037, simply is of no relevance. In the *Dailey* case the area for which rezoning was sought was totally surrounded by property zoned for high-density, multiple-family purposes. Yet, similar rezoning was denied on the subject property. In the *Dailey* case, the District Court had specifically made findings of racial motivation. The Court had found that there was no evidence in support of contentions that the rezoning was denied for any other reason, and the director of the plan commission in *Dailey* had testified that there was no reason why the property there should not have been rezoned to the R-4 high-density multiple sought for low income housing.

In the instant case, of course, both the trial court and the Court of Appeals recognized that the Village was administering its Zoning Ordinance in a non-discriminatory manner, and all the Court of Appeals held was that, maintaining the integrity of the zoning plan and protecting neighboring property values, both of which objectives were concededly achieved by the Zoning Ordinance, simply did not meet the "compelling interest" test.

It simply is contrary to the facts to allege that the petitioners

admitted they blocked Lincoln Green in response to community opposition, a result they knew would maintain residential segregation in the area. The purpose was maintaining a single-family zoning classification which was completely consistent with the well-established single-family community. It had nothing whatsoever to do with racial considerations.

The other cases cited in the footnote to respondents' brief, including *Kennedy Park Homes, Black Jack, Banks, United Farmworkers,* and *Hawkins,* have no application to the case at bar, particularly in light of the fact that there was no finding by either the trial court or the Court of Appeals of any racial motivation in the instant case.

B. The Petitioners' Refusal to Permit the Construction of Lincoln Green Does Not Unlawfully Perpetuate Residential Segregation.

The holding of the Seventh Circuit was that the rejection of the Lincoln Green proposal has racially discriminatory effects. 517 F. 2d 409, 415. That finding, we respectfully suggest, is totally unsupported by the record in this case. The Court of Appeals ignored the finding of the trial court that the failure to rezone affects low earners "but this affects the entire group, not merely blacks or Mexican-Americans. The Fourteenth Amendment and the Civil Rights Act prohibit discrimination against blacks and certain other minorities but does not afford rights to poor people as such." 373 F. Supp. 208, 210.

Moreover, an analysis of the record clearly indicates that the refusal to rezone Lincoln Green does not have a demonstrable effect of discriminating against minorities.

The Court of Appeals accepted two premises offered by the respondents which simply are not justified by the record. The first was a conclusion reflected in the footnote at page 414 of the opinion that Arlington Heights was the most residentially segregated community in the Chicago metropolitan area among

municipalities with more than 50,000 residents. deVise never said that. What deVise did say was that, based purely on a highly theoretical distribution of black households throughout the metropolitan area, 5% of the population of Arlington Heights would be black, but that was based solely on the economics of the housing market. (Tr. 625) deVise never suggested that the failure of more than 5% of the black population to reside in Arlington Heights was due to anything but the economics of the situation. He described Arlington Heights as a dormitory community. (Tr. 631) It had the most expensive housing of all the communities having more than 50,000 population. Even so, deVise conceded that, based upon the economics of the housing market, at least 3,244 blacks could afford to live in Arlington Heights, of which 378 black households would be able to afford single-family housing in Arlington Heights, and 473 black households would be able to rent housing in Arlington Heights. (Tr. 588) deVise never suggested that the action of Village officials through zoning or anything else was keeping blacks from residing in Arlington Heights. deVise's testimony to the effect that he believed the reasons blacks didn't reside in suburban communities was their fear of lack of acceptance, was stricken from the record. (Tr. 637, 638) The most that can be said is that the economics of the housing market restrict the number of poor people who could afford to live in Arlington Heights.

It is of course not true, as stated by the Court of Appeals, that a greater percentage of blacks than whites are affected by the Village's decision. Even if we accept the premise that blacks would comprise 40% of the eligible prospective tenants for Lincoln Green, that would mean that 60% non-blacks would also comprise the eligible prospective tenants and the impact would be greater on non-blacks than on blacks.

But the assertion that 40% of the eligible prospective tenants would be black simply is not supported by the record. All deVise said was that blacks make up about 40% of the potentially

eligible population for moderate income housing in the SMA. (Tr. 592) The SMA consists of six counties. There was absolutely no evidence in the record to indicate that a single black or Spanish-speaking person would in fact seek to live in Lincoln Green. Here again, as the trial court noted, "there are many reasons why members of minority groups would not necessarily move into the defendant village, besides alleged discriminatory violations." 373 F. Supp. 208, 210.

Respondents' reliance upon *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), and *Wright* v. *City of Emporia*, 407 U. S. 451 (1972) is unavailing. Neither case cited supports the proposition that the refusal to rezone is unlawful. The *Burton* case involved the specific refusal to serve a Negro in a restaurant located in a public building. The *Wright* case involved a dual school system which had the effect of perpetuating racial discrimination in violation of this Court's decision in the *Brown* case.

There is no showing that the Village's action has anything to do with reinforcing or prolonging segregated housing patterns in the Village. The respondents' assertion that the Village's action is subject to "strict scrutiny" and requires a "compelling justification" is not in accord with the numerous decisions of this Court and other courts of appeal throughout the country. *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974), 39 L. ed. 2d 797; *Lindsey* v. *Normet*, 405 U. S. 56 (1972). 31 L. ed. 2d 36; *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973), 36 L. ed. 2d 16; *Lawrence* v. *Oakes*, 361 F. Supp. 432 (D. Vt. 1973); *Skillken & Co.* v. *City of Toledo*, Nos. 74-2116 and 74-2320 (6th Cir. December 10, 1975); *Citizens Committee for Faraday Wood.* v. *Lindsay*, 362 F. Supp. 651 (S. D. N. Y. 1973), *aff'd* 507 F. 2d 1065 (2nd Cir. 1974).

The result of the Village's action in the present case of course is not to exclude minorities from or perpetuate segregation in Arlington Heights. As indicated in the *Skillken* case, a

rational basis test rather than a compelling interest test is to be applied in testing of zoning ordinances.

The Court of Appeals' analysis that a greater percentage of blacks than whites would be injured by the municipality's actions simply is contrary to the facts. However, *James* v. *Valtierra*, 402 U. S. 137 (1971), stands for the proposition that the fact that a legal requirement may have a greater impact upon the poor or other minority does not render that requirement invalid under the Fourteenth Amendment. The Seventh Circuit reluctantly admitted that *James* stands for the proposition that racial disparity alone, as it relates to the housing project under consideration, would not amount to racial discrimination.

Reliance on the *Dailey* case, as indicated, is simply unwarranted because of the difference in the facts shown by the record. There is no segregative effect which results from the petitioners' refusal to permit construction of Lincoln Green. As the trial court properly recognized, the only effect of that refusal is to deny the right of poor people to live wherever they want to live, notwithstanding a reasonable zoning classification.

The respondents in their brief cite the footnotes in the Court of Appeals' opinion setting forth certain statistical data. The fact of course that the Chicago metropolitan area has seen a shift in population and a shift of job locations does not mean that the Village of Arlington Heights violated the Fourteenth Amendment when it refused an irrational zoning request. There of course is no evidence that the reason only 137 of the 12,000 people who worked in Arlington Heights were black was due to the zoning pattern of the Village of Arlington Heights. In fact, as indicated above, a substantial number of blacks can afford to live in Arlington Heights and their reasons for failing to do so have nothing to do with the zoning pattern of the Village.

Citation of an OEO study showing that almost all the black workers in Arlington Heights reside in Chicago also has nothing to do with the issues in this case. As a matter of fact, there are

more residents of Arlington Heights working in Chicago than there are residents of Arlington Heights working in Arlington Heights. The choice of job locations is obviously dependent on many factors and certainly cannot be used to impute to the Village of Arlington Heights racial motivations in preserving a single-family zoning classification in an area which is and always has been exclusively single family.

Nowhere in their brief do the respondents choose to refer to *Milliken* v. *Bradley*, 418 U. S. 717 (1974), where this Court in a school segregation case held that racial imbalance in itself is not to be equated with a constitutional violation calling for remedy. This Court indicated that the fact that Detroit schools were segregated did not require an intra-district plan outside the corporate limits, absent any showing that the suburban school district had in fact discriminated.

Here, it was conceded by both the trial court and the Court of Appeals that the Village had not discriminated in its zoning pattern. The Lincoln Green proposal does not present a unique opportunity to reverse a supposed trend toward the segregated housing pattern in the Chicago area or in Arlington Heights. There is no evidence that any blacks would occupy the Lincoln Green project, nor is there any evidence that the Zoning Ordinance of the Village of Arlington Heights had anything to do with segregation, either in the Chicago area or in the Village of Arlington Heights. It is not true that the rejection of Lincoln Green means that there will be no integrated or subsidized housing built in Arlington Heights.

The test as to whether a zoning ordinance perpetuates discrimination is whether it has been applied in a racially discriminatory manner and completely out of context with the surrounding land uses. Thus, as in *Dailey* v. *City of Lawton*, 425 F. 2d 1037, it may well be argued that, when an R-4 multiple-family zoning classification is denied to a tract of land which is totally surrounded by an R-4 classification simply because there would be blacks residing on the rezoned site, racial

discrimination exists, but that argument cannot stand when the zoning is applied in a nondiscriminatory manner which is totally consistent with sound zoning and planning principles. Contrary to the contention in the respondents' brief, the *Dailey* case is in no way similar to the instant case.

The citation of *United States* v. *Black Jack*, 508 F. 2d 1179, is likewise totally inappropriate. In *Black Jack*, the village passed an ordinance totally banning multiple-family dwellings after a reservation of federal funds had been made for a low income multiple housing project. In that case the evidence adduced in support of the ordinance was inadequate with respect to traffic and burden on the schools. There was evidence showing no depreciation on nearby properties, which was not controverted. As a matter of fact, the ordinance in that case would have resulted in less than one per cent of the land in the community being zoned for apartments, despite a demonstrated need for apartments. *Black Jack* in fact stands for the proposition that the plaintiff has to establish a prima facie case by demonstrating a racially discriminatory effect. 508 F. 2d 1179, 1185. There was of course no racially discriminatory effect demonstrated in the instant case.

The case of *Kennedy Park Homes Association* v. *City of Lackawanna*, 318 F. Supp. 669, also cited by the respondents, again is not in point. In that case property was rezoned to prevent a specific housing development and a moratorium was declared on new subdivisions, after the intent of the Archdiocese to sell land for a low income housing project was made known. After the rezoning was set aside, the development was prevented by the mayor's refusal to sign a permit for sewer extension, despite the fact that the sewer conditions relied upon to support the refusal of the permit had existed for many years and had not been the basis for any other refusal. The factual situation in *Kennedy* included the fact that the mayor and the president of the city council had signed a petition to the Archdiocese opposing the sale of the land. The City of Lackawanna historically

had demonstrated a segregated pattern with the Negroes being confined almost entirely to one ward. What is significant for the instant case is the holding found on page 694 of the *Kennedy Park Homes* case to the effect that the Fair Housing Act of 1968 does not include discrimination based on poverty.

Crow v. *Brown*, 332 F. Supp. 382, also relied upon by the respondents, does not support the respondents' position. In that case there was a refusal to issue building permits for public low rent housing *on land properly zoned*. The record in that case showed that the denial of the permits was purely for racial reasons.

The case of *United Farmworkers* v. *City of Delray*, 493 F. 2d 799, is not a zoning case. In that instance there was a request to tie into the city's existing water and sewer system which was 800 feet away from the farmworkers housing project site. The city had consistently offered sewer service to other property outside the corporate limits. Under those circumstances the Court held that since the city had provided services outside its geographic limits, it must do so in a racially nondiscriminatory manner. The evidence was clear that the minority citizens' requests were refused, but white citizens' requests were granted. The city's master plan had been changed for whites, but not for farmworkers. As a matter of fact, at page 808 of the opinion the Court pointed out that the farmworkers' appeal was not based primarily on a claim of a denial of a fundamental right to decent housing, citing *Lindsey* v. *Normet*, 405 U. S. 56, or upon a claim of discriminatory treatment engendered by a suspect wealth classification, citing *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1. Clearly, in *United Farmworkers*, there was a denial of equal protection because the minority group there was denied privileges regularly extended to white citizens. No such distinction is shown in the case at bar.

C. It Was Not Necessary to Show Compelling Public Justification to Support Petitioners' Rejection of Lincoln Green.

The respondents rely upon the Court of Appeals' determination that the refusal to amend the Zoning Ordinance could only be justified by a compelling state interest. As we indicated in our original brief, the compelling interest test should not be applied to the case at bar.

The respondents make no attempt to answer the substantial line of cases in which this Court and the various courts of appeal have held in zoning cases and similar actions that, because there was no fundamental constitutional right at stake, the compelling interest test was not appropriate.

There is no attempt made to distinguish the clear holding of this Court in *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974), that a zoning ordinance involved no fundamental right guaranteed by the Constitution. Also ignored are the holdings of this Court in *Lindsey* v. *Normet*, 405 U. S. 56 (1972), and *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973), which clearly held that in the case of housing there is no need of justifying a law by showing compelling state interest.

Totally ignored is the case of *Skillken & Co.* v. *City of Toledo*, Nos. 74-2116 and 74-2320, decided by the Court of Appeals for the Sixth Circuit on December 10, 1975. There in a zoning case the Court of Appeals specifically held that the District Court erred in applying the compelling interest test rather than a rational basis test in determining the validity of the Toledo zoning ordinance. Also totally ignored is *Citizens Committee for Faraday Wood* v. *Lindsay*, 362 F. Supp. 651, *aff'd* 507 F. 2d 1065 (2nd Cir. 1974), where the Court held that low income status is not recognized as a suspect classification.

No mention is made in the respondents' brief of the recent decision in *Construction Industry Association of Sonoma*

County v. *City of Petaluma,* No. 74-2100, decided by the Court of Appeals for the Ninth Circuit, wherein the Court rejected the concept that an allegedly exclusionary zoning ordinance was a violation of the Fourteenth Amendment. The Court there insisted that the test of a zoning ordinance was whether it bore any rational relationship to a legitimate state interest. It refused to apply the compelling interest test. This Court denied a petition for certiorari in the *Petaluma* case on February 23, 1976, 44 L. W. 3473.

In the case of *Ybarra* v. *City of Town of Los Altos,* 503 F. 2d 250, the Court of Appeals for the Ninth Circuit specifically refused to apply the compelling interest test in a case challenging a large-lot zoning ordinance on the grounds that it excluded Mexican Americans. The Court there held that discrimination against the poor does not become discrimination against a minority simply because there is a statistical correlation between poverty and ethnic background. 503 F. 2d 250, 253.

Thus, the Court of Appeals' application of the compelling interest test simply is contrary to the settled law on the subject.

Respondents' convoluted argument that an affirmative duty has not been imposed upon Arlington Heights simply flies in the face of the language of the Court of Appeals' opinion which mandates the Village to take the affirmative action of changing the Zoning Ordinance because of the alleged possibility that blacks may reside in the housing which could then be built. At page 414 of the opinion, the Court said: "Since no direct action attributable to Arlington Heights created the segregated housing pattern, the municipality argues that it has no affirmative duty to alleviate the problem. We do not agree." That language clearly imposes an affirmative duty, contrary to the decision of this Court in *Milliken* v. *Bradley,* 418 U. S. 717 (1974), and the numerous other cases cited in this and our original brief.

The footnote in the respondents' brief to the effect that the Village Plan was adopted in 1959 and most of the homes were built prior thereto is not supported by the record. Mr. Opelka

testified that the subject property adjoins the rear yards of single-family homes, the majority of which were built in the last 10 years. Across from the high school of Oakton, the homes were built in the last few years, and some new homes are under construction. On Euclid Avenue, across the street from the subject property, are homes which were built in the last 5 to 10 years. (Tr. 914, 915, 916) Thus, a substantial number of single-family homes were built after the adoption of the 1959 Plan and in reliance upon that Plan.

The petitioners' legitimate justification for refusing to change the zoning is the protection of surrounding property values and the preservation of the integrity of the Zoning Ordinance. These objectives are of course the proper objectives of any zoning ordinance. The respondents fail to cite a single case relating to so-called exclusionary zoning wherein the refusal to rezone has been held invalid under circumstances similar to the case at bar.

No attempt is made to even mention, let alone distinguish, *Ybarra, Skillken,* or *Confederation de La Raza Unida* v. *City of Morgan Hill,* 324 F. Supp. 895 (N. D. Calif. 1971), all zoning cases cited in our original brief and all of which refused to apply the strict scrutiny test.

We have already demonstrated in our original brief that, applying the criteria set forth by the courts of the State of Illinois in determining the validity of a zoning ordinance, the refusal to rezone the subject property in the midst of a single-family area to increase the density threefold was a reasonable and legitimate exercise of the police power. Again, we state that the possibility that housing will be occupied by low or moderate income persons of whatever race does not justify the application of different standards when, admittedly, the zoning ordinance has not been administered in a discriminatory manner and is, in fact, a totally reasonable exercise of the police power.

The respondents' assertion that the courts have recognized the necessity for considering the rights of non-residents as well

as residents in assessing the reasonableness of suburban zoning actions simply ignores the holding of this Court in *Warth* v. *Seldin*, 422 U. S. 490 (1975). See also, *Cornelius* v. *Parma*, 374 F. Supp. 730 (N. D. Ohio 1974), *aff'd* 521 F. 2d 1401, *cert. denied* 3/8/76, 44 L. W. 3501.

The case of *Lakeland Bluff, Inc.* v. *County of Will*, 114 Ill. App. 2d 267 (1969), 252 N. E. 2d 765, applied the conventional tests for determining the validity of a zoning ordinance which were set forth in our original brief. The Court at page 279 specifically indicated: "We do not predicate our conclusion upon the need for lower cost housing." *Lakeland* is simply a garden variety zoning case in which the need in the community for mobile homes was considered. *Glassey* v. *County of Tazewell*, 11 Ill. App. 3d 1087 (1973), 297 N. E. 2d 235, was another mobile home park case in which the Court considered as one of eight factors the community need for the proposed use.

The statement in the respondents' brief that the evidence here clearly establishes "a desperate areawide need for low and moderate income housing" is neither supported by the record, nor does it justify putting high-density multiple housing in the midst of a single-family area. The Courts of Illinois, while occasionally considering need for a specific use as one possible factor in determining the validity of a zoning restriction, have refused to give this factor any controlling weight. *Locker* v. *City of McHenry*, 89 Ill. App. 2d 457, 643 (1967).

The proposed development clearly is not complimentary to the surrounding housing, but, as the trial court found, would have a detrimental effect upon the value of surrounding properties. This diminution of neighboring home values is not a reflection of the prejudice of the local homeowners, but in fact the workings of the housing market wherein the intrusion of a high-density development in the midst of a single-family area inevitably lowers property values of the existing homes.

The fact that multiple family might represent the "highest and best use" from a purely economic standpoint is neither conclusive with respect to the validity of a zoning ordinance, nor does it support a finding of a violation of the Fourteenth Amendment because of racial discrimination. As the Court stated in *Seith* v. *City of Wheaton*, 89 Ill. App. 2d 446 (1967) at 451 in passing on a restriction for single-family use: "Although the highest and best use of the property may be for either duplex and less dense multiple use or the fact that the property would be worth substantially more to the owner if the restriction were removed is not in our opinion sufficient to overcome the presumption of the validity of the Wheaton zoning ordinance . . ."

There are no public interest considerations favoring the development of Lincoln Green, however, the respondents choose to define the concept of "public interest." In *Stalzer* v. *Village of Matteson*, 14 Ill. App. 3d 891 (1973), 303 N. E. 2d 489, the subject property had been vacant for 70 years and adjoined a tract zoned for industrial use to the west and to the north. No expert witness for either side testified that the R-1 zoning on the property represented its highest and best use. The Court found that the existing zoning and uses of nearby property were incompatible with the R-1 zoning and the light industrial uses to the immediate north of the subject property made such classification incongruous. The case was finally decided on the basis that the zoning imposed a substantial reduction in the value of the property owned by the plaintiffs. In the instant case, the owners are not even plaintiffs, and the property is admittedly worth $75,000 more for the permitted single-family use than the owners will secure under the contract of sale.

The respondents refer to the District Court's finding that the refusal to rezone was based upon "the integrity of the Village's zoning plan." All the evidence supports the conclusion of the District Court, and that finding was not disturbed by the Court of Appeals. Apparently the respondents complain because the development subsequent to 1959 was in fact in conformance with the 1959 Plan. The rezonings to multiple-family use were undertaken by the Village for the purpose of providing a multiplicity

of housing types in the community at appropriate locations. Despite the rhetoric of the respondents, there is no evidence of any need to accommodate low and moderate income persons working in the Village of Arlington Heights. The record is totally devoid of any specific evidence as to the number of persons working in the Village who would meet the criteria for low and moderate income housing, and would choose to reside in Lincoln Green.

It was unnecessary to show any compelling justification to support the refusal to permit construction of Lincoln Green in the location sought by the respondents. The refusal to rezone, when such rezoning would be detrimental to surrounding property values, violate the Village's established zoning plan, and result in a totally incompatible development in a well-established single-family area, is not a violation of the equal protection clause or the Fourteenth Amendment.

II.

THE PETITIONERS' REFUSAL TO PERMIT DEVELOPMENT OF LINCOLN GREEN DOES NOT VIOLATE THE FAIR HOUSING ACT OR THE CIVIL RIGHTS ACT.

A. Introduction.

The trial court in this case specifically found that no specific section of the Fair Housing Act is referred to in the pleadings, and none seem applicable to the facts of this case. 373 F. Supp. 208, 209. In referring to the Civil Rights Act and the Fair Housing Act, the trial court found that these statutes do not reach zoning per se. 373 F. Supp. 208, 212. The Court of Appeals made its decision solely on the basis of the Fourteenth Amendment, without reference to either the Civil Rights Act or the Fair Housing Act.

The respondents still do not favor us with any specific violation of any specific provision of either statute. Section 804(a)

of the Fair Housing Act makes it unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." Clearly, there is no evidence in this record of any violation of any of the petitioners of this section. Section 817 of the Fair Housing Act makes it unlawful to interfere, coerce or intimidate any person in the exercise of their rights granted under Sections 803, 804, 805 and 806 of the Statute. No evidence exists in this record to support any charge of such interference or coercion.

The case of *United States* v. *City of Black Jack*, 508 F. 2d 1179, is completely distinguishable on its facts. As indicated above, the city there had passed an amendment to its ordinance after HUD had issued a feasibility letter for federal funding of a 236 project. That amendment would have prohibited the construction of any multiple-family dwellings and made present ones nonconforming uses. The evidence in that case was clear that many blacks would live in the development proposed and that the broad exclusionary ordinance would deny persons housing on the basis of their race. No such situation pertains in the case at bar.

The Village is not using its zoning power to interfere with private efforts which would appreciably reduce segregation in its jurisdiction, as alleged by the respondents. Instead, it is refusing to amend its perfectly proper Zoning Ordinance merely because the proposed project conceivably could house some blacks, as well as whites. No violation of either the Fair Housing Act or the Civil Rights Act has been demonstrated.

In the case of *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U. S. 205 (1972), this Court held that any person who claims to have been injured by a discriminatory housing practice had standing to sue under the Civil Rights Act. The case involved persons in a housing unit who claimed to have been injured by discrimination against non-whites in the rental of the

apartments of the complex in which they resided. That decision clearly has absolutely no bearing on the factual situation in the case at bar.

B. Arlington Heights' Conduct Did Not Have the Effect of Perpetuating Segregation and It Had No Burden to Show a Compelling Nonracial Justification for the Refusal.

There is nothing in the record to support the respondents' claim that Arlington Heights has become a 99% white city through zoning and other municipal decisions. In fact, the zoning decisions of the Village of Arlington Heights have produced some 6,000 apartments and 12,000 homes available to all persons without regard to race. Undoubtedly, the housing market in the past decade has prevented many people lacking sufficient income from buying or renting homes in Arlington Heights, but this fact does not mean that the Village of Arlington Heights has to abandon its Zoning Ordinance under the Fourteenth Amendment, the Civil Rights Act, or the Fair Housing Act. There is no evidence that the Village has exploited anyone.

As we have indicated above, the compelling interest test is not applicable to this zoning controversy. We have also distinguished the *Black Jack* case at length. There is no evidence that Lincoln Green would reduce segregation, or in fact that a single black person would necessarily reside in the Lincoln Green project. It was clear in the *Black Jack* case that black citizens were being effectively barred by the passage of an ordinance prohibiting any multiple-family development.

The Zoning Ordinance is not being used to frustrate a unique development which would in fact be significantly more integrated than the community. The Zoning Ordinance is being used in conformance with the requirements of the police power and being applied in an admittedly nondiscriminatory manner. It is clear from the language of the Court of Appeals' opinion that, in fact,

it is seeking to impose on the Village of Arlington Heights the "affirmative duty to alleviate the problem (of segregated housing in the Chicago area)."

In citing *Acevedo* v. *Nassau County*, 500 F. 2d 1078 (2d Cir. 1974), 1081, the respondents fail to note that *Acevedo* held that there was no duty under the Fair Housing Act on any government body to construct or to "*plan for, approve and promote* any housing." 500 F. 2d 1078, 1082. The citation from *Acevedo* applies to "refusing to accede to a reasonable rezoning request." Here, neither the District Court nor the Court of Appeals determined that the refusal was an unreasonable one and, in fact, the refusal was totally consistent with sound zoning principles and admittedly the result of a nondiscriminatory administration of the Zoning Ordinance.

An affirmative duty is being sought to be imposed upon Arlington Heights—that is the duty to change its ordinance, regardless of the soundness of the ordinance from a zoning and planning standpoint, to accommodate a hypothetical minority occupancy at the expense of the surrounding property owners and the integrity of the zoning plan.

C. The Acts Complained of Do Not Violate Title VIII of the Fair Housing Act.

Again, the respondents have failed to point out any specific acts which violate Title VIII. The *Trafficante* case turned on standing to sue under the Civil Rights Act. It of course had nothing to do with the Fair Housing Act. HUD's administrative criteria to provide for integration is not at issue in this case. We concur in a broad interpretation of the Civil Rights Act of 1966, but there is no evidence, intent, or accomplishment of racial discrimination by the actions of the Village in this case.

The case of *Clark* v. *Universal Builders, Inc.*, 501 F. 2d 324 (7th Cir. 1974), is clearly not in point. The decision involved private action in creating a dual housing market and

turned on the question of the propriety of granting a directed verdict for the defendants at the close of plaintiff's case. *Clark* merely held that the allegations made a *prima facie* case for a violation of the Civil Rights Act. It has no relationship to the questions raised in this action.

We have previously distinguished the *Black Jack, Kennedy Park Homes,* and *Delray Beach* cases. *Sisters of Providence* v. *City of Evanston,* 335 F. Supp. 396 (N. D. Ill. 1971), merely held that a complaint stated a cause of action. The allegations in that complaint were substantially different than those in the case at bar. The *Black Jack* case, even if good law, is clearly distinguishable because of the proof in that case that blacks would in fact reside in an already approved federally aided project, and that the city had taken the affirmative action of barring all multiple-family development as soon as federal funding of the project became a reality.

The Village of Arlington Heights has maintained single-family zoning on the subject property since its first Zoning Ordinance long before the advent of Lincoln Green. The entire area has developed in reliance upon that single-family zoning, which is completely in keeping with sound planning and zoning principles. The possibility that some blacks may reside in the Lincoln Green project is not a sufficient basis for requiring Arlington Heights to abandon this undoubtedly reasonable zoning restriction.

Reliance on the *Lackawanna* case is particularly ironic in view of the specific holding at 318 F. Supp. 669, 694, that "the nature of the discrimination prescribed under the Fair Housing Act is limited in that it does not include discrimination based on poverty."

D. The Court's Interpretation of Similar Legislation Does Not Show the Complained of Action Violates the Fair Housing Act.

The respondents attempt a bootstraps approach by relying upon this Court's decision in *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971). That case decided under the Equal Employment Opportunity Act of course stands for the proposition that employment testing must be job related. The respondents do not cite the language of this Court in *Griggs* at 431, where the Court said: "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." What *Griggs* says is that arbitrary and unrelated job tests may not be used to discriminate against a racial minority. It clearly does not require that all reasonable legislative acts must be set aside merely because minority group members might benefit.

The *McDonnell* case is likewise not in point and simply required the remandment for trial of a complaint alleging that the reason for refusing to reemploy a Negro violated Title VII. The Court there noted that, if the reason assigned for refusing to reemploy was not pretextual or discriminatory in its application, the employer's refusal to rehire must stand. The case clearly is not applicable to the facts at bar.

The respondents' argument must of course fall because the action of the Village in refusing to alter its existing, valid zoning restrictions was not predicated on any racially discriminatory pretext, nor, as was conceded by both the trial and the Court of Appeals, was the Village's zoning administration discriminatory in character.

Griggs and the cases following it do not impose upon the Village any requirement that it zone for the purpose of providing a racial quota in the housing pattern of the Village. The most

recent employment case dealing with this question in the Court of Appeals for the Second Circuit was determined on the basis of the Civil Rights Acts of 1866 and 1871. In the case of *Kirkland* v. *Dept. of Correctional Services* (U. S. D. C., S. D. N. Y., August 6, 1975), 11 FEP Cases 36, the Court specifically rejected the concept of racial quotas in the hiring of officers in the New York State Department of Correctional Services. The Court there noted:

> "The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society.
>
> "The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited. Commentators merely echo the judiciary in their disapproval of the 'discrimination inherent in a quota system.'"

In *Kirkland* the Court noted with approval the dissenting opinion of Mr. Justice Douglas in *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974), 40 L. ed. 2d 164, where at page 336, Mr. Justice Douglas said:

> "There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards."

However appropriate the language of the Equal Employment Opportunity Act may be with respect to meeting problems in that area, neither that statute nor cases decided under it have any relevance to a situation where a municipality in a non-discriminatory manner merely seeks to preserve the integrity of its zoning pattern and protect surrounding property values from the incursion of a high density use.

III.

THE RESPONDENTS HEREIN HAVE NO STANDING TO SUE.

As pointed out in our original brief, the question of standing was originally raised by the petitioners in a pretrial motion and the question of standing was carefully considered by the trial court. Thus, the question is properly before this Court. We respectfully suggested that the case of *Warth* v. *Seldin*, 422 U. S. 490, 45 L. ed. 2d 343, is conclusive.

The individual respondents clearly do not have standing. The two individuals who actually testified in the case, Guthrie and Ransom, were black citizens living outside of Arlington Heights. Guthrie drives his car from the south side of Chicago where he owns his two-flat home. He purchased his home in 1973 for $21,000 and receives $160 a month rent from the other unit. His wife is employed, but he did not know her salary. He had not gone to any real estate brokers in Arlington Heights or asked to be shown any housing. There was no testimony as to the total family income. It is clear that he never personally sought housing in Arlington Heights.

Mr. Ransom lives in a single-family home in Evanston with his son and his mother. His mother is also employed and, here again, there is no showing that he was eligible by income to reside in Lincoln Green. He testified he had never sought out any housing in Arlington Heights.

The allegations of the complaint in fact fail to set forth the kind of facts which this Court found was necessary in *Warth* to give any standing to the individual plaintiffs. There were no allegations that either Ranson or Guthrie either desired or would occupy the Lincoln Green housing if constructed. Mrs. Maldonado of course resides in Arlington Heights and therefore clearly cannot be held to have been zoned out of the Village.

The Village of Arlington Heights, contrary to the statement in the respondents' brief, of course has not interferred with the private housing market to prevent the construction of Lincoln Green. It is in fact the workings of the housing market which have set the price level and determined the occupancy of housing accommodations in Arlington Heights.

The respondents in their brief make no effort to justify the standing of the Northwest Opportunity Center or Mrs. Maldonado. Clearly, neither have any standing. MHDC however alleges that it has standing. In this regard it should be noted that MHDC is in fact not injured in any manner by the refusal of the Village to rezone at its request. It has a contract to purchase based upon the ability to secure zoning and financing under Section 236. The failure to secure either results in the cancellation of the contract. Its 99 year lease for $1.00 a year is also conditioned on zoning and the ability to secure 236 financing. Having failed to secure either, MHDC is not obligated under either its contract to purchase or its longterm lease. Moreover, as the trial court noted, MHDC as a corporation cannot be the victim of racial discrimination. It has no racial identity. It suffers no damage in its corporate capacity.

Also in point was the decision of the District Court for the Northern District of Ohio in *Cornelius* v. *City of Parma,* 374 F. Supp. 730 (N. D. Ohio 1974), 521 F. 2d 1401. In that case the Court held that low income black residents of the inner city had no right to challenge the conduct of an all-white suburb in refusing a building permit for a 236 development which would have had black residents. On March 8, 1976, this Court denied certiorari noting at 44 L. W. 3501:

> "Appeal from dismissal of complaint filed by lower income black residents of inner city challenging conduct of all-white suburb excluding subsidized lower income housing is, in accordance with Supreme Court order remanding case for further consideration in light of Warth v. Seldin, 422 U.S. 490, 43 L.W. 4906 (1975), remanded to district court with instructions to dismiss complaint."

The respondents' reliance on *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U. S. 205 (1972), is simply misplaced. *Trafficante* was distinguished in *Warth* because, as here, none of the non-minority plaintiffs made any allegations that they had suffered any justiciable, cognizable injury. In *Trafficante,* the plaintiffs were residents of housing facilities covered by the statute. They were held to have standing to be free from the adverse consequences to them of racially discriminatory practices in the facility directed at and immediately harmful to others. No party in this action alleged any such circumstances, nor was there any proof of any damage.

We respectfully suggest that not only has there been no violation of the Fourteenth Amendment, the Civil Rights Act or the Fair Housing Act by the conduct of the petitioners herein, but that these respondents have no standing to challenge the acts of the Village of Arlington Heights.

IV.

THE BRIEFS OF THE AMICI FAIL TO JUSTIFY THE DECISION OF THE COURT OF APPEALS.

Two amicus curiae briefs have been filed in this action, one by the American Society of Planning Officials, and the other by a number of organizations led by the League of Women Voters. Both briefs indicate not only a lack of knowledge of the record in this case, but a lack of understanding of what the trial court and the Court of Appeals actually held. Both go well outside the record and reflect a particular social policy rather than any attempt at legal analysis. Most of all, they also ascribe to the Village racial motivations and discriminatory practices which not even the Court of Appeals was willing to find.

The League of Women Voters' brief states that Arlington Heights has made no effort to alleviate the pattern of segregated housing in the metropolitan area. This statement comes with ill grace from the local League of Women Voters which has

actual knowledge of facts which are contrary to the allegations of this kind. We direct the Court's attention to facts which are well known to the League of Women Voters in Arlington Heights. The Village has taken the following official actions before and after the particular zoning controversy which is the subject matter of this cause:

1. It adopted a Fair Housing Ordinance in 1968, becoming one of the first communities in the northwest suburban area to do so.

2. It received approval for 119 units of low income housing for the elderly, presently administered through the Cook County Housing Authority, with construction expected to begin within the calendar year. The Cooperation Agreement with the Cook County Housing Authority was approved by the Village on April 20, 1970, before any action was taken on the Lincoln Green project.

3. The Village has empowered the Village Housing Commission to encourage private developers to include a percentage of low income units within proposed projects, as well as seeking availability of existing units for housing subsidies.

4. The Village officials adopted a housing assistance plan which seeks provision of 125 subsidized units (first year goal) and 375 units (three year goal) as part of the Village's application for entitlement funds under the Housing and Community Development Act of 1974.

These facts are public records and are clearly available for verification by any person sincerely interested in knowing the facts. Moreover, there has been a continuing movement of black, oriental and spanish-speaking families and individuals into the Arlington Heights community during recent years.

The Lincoln Green controversy was a zoning controversy, pure and simple. The briefs of the amici indicate clearly that they are not interested in the facts or law, but are simply concerned with unjustly tarring this Village.

Thus, the statement in the League of Women Voters' brief that Arlington Heights has made no effort to alleviate the

segregated housing pattern in the Chicago metropolitan area and in the Village simply is not true. The brief ignores the fact that both the trial and the Court of Appeals specifically found that the Zoning Ordinance has not been administered in a discriminatory manner. The holding of *Belle Terre* is that there is no fundamental constitutional right to housing and that a zoning ordinance is not measured by the compelling interest test.

The League further cites *Milliken* v. *Bradley*, 418 U. S. 717, but ignores the holding of that case which clearly indicates that racial imbalance in itself is not to be equated with a constitutional violation calling for a remedy, and that, absent a showing of discrimination by Arlington Heights in the administration of an ordinance clearly valid on its face, the Village does not have an affirmative duty to ignore its Zoning Ordinance because the Chicago area is allegedly segregated.

There is absolutely no evidence that the Zoning Ordinance of Arlington Heights has created or perpetuates a segregated community. The Village has not engaged in exclusionary zoning practices, nor was the refusal to alter a rational and valid zoning plan in this case anything but a reasonable exercise of the police power. The League's allegations of an attempt to attract industry but keep out workers flies in the face of deVise's testimony that Arlington Heights is a dormitory suburb and has less industry than any of the surrounding communities.

We have demonstrated above that there has been no violation of the Fair Housing Act of 1968 and the Civil Rights Acts. The League fails to cite any authority for requiring the Village of Arlington Heights to disavow its Zoning Ordinance simply because it is possible that some blacks might occupy Lincoln Green. We deny that the actions or inactions of the Village have contributed to the existence or perpetuation of segregated housing. The League and its fellow amici fail to cite any facts or law to support this unwarranted conclusion.

The housing pattern in Arlington Heights does not warrant the remedy sought by the respondents in this case. No constitutional rights have been impinged upon and no violations of any federal statute or the Fourteenth Amendment have been committed. The League speaks of "restrictive practices of Arlington Heights," but it fails to cite any specific restrictive practice because none exists. Again, though the League cites *Milliken,* it fails to set forth facts showing wherein the Village or Arlington Heights participated in or caused any wrong.

The brief of the American Society of Planning Officials, which was filed without authority of its Board of Directors, betrays a lack of knowledge of the facts and the record, as well as the law in this case. Most of the cases cited in the ASPO brief have been distinguished in the body of this brief. The case of *Sisters of Providence of St. Mary of the Woods* v. *Evanston,* 335 F. Supp. 396 (N. D. Ill. 1971) involved the sufficiency of the allegations of a complaint to withstand a motion to dismiss. We are not involved in a case of refusing to rezone for a black project under the same circumstances the Village would have granted a variance to an all-white project. The trial court and the Court of Appeals held that the Zoning Ordinance of Arlington Heights had been administered in a nondiscriminatory manner.

The amicus fails to recognize that the failure to grant the rezoning here has no effect on a racial minority. At best, a low income group generally, clearly not a suspect class, may have been deprived of the right to live in a high density development in the midst of a single-family district.

ASPO improperly cites the holding of this Court in *Palmer* v. *Thompson,* 403 U. S. 217 (1971) to the effect that the mere fact that a governmental act may have a greater impact upon the poor or a minority group does not thereby invalidate it. There is of course no evidence that the Lincoln Green project would have been occupied by a large percentage of minority

families. In fact, the majority of those eligible for the Lincoln Green housing were admittedly non-minority families.

ASPO like the respondents asserts that a compelling interest test should be applied to this zoning controversy, notwithstanding the fact that, as we have demonstrated above and in our original brief, the compelling interest test simply is not applicable to questions of this nature.

We are not involved here, as in *Lackawanna,* with refusing to accede to a reasonable rezoning request. What is at stake is a totally unreasonable request which would violate the well-established and sound zoning regulations upon which the community has relied. There is absolutely nothing in the record to indicate that Arlington Heights is "clearly a segregated community" because of the zoning pattern. There is no showing that the respondents' development would alleviate the purported segregated housing situation. The denial of rezoning clearly is not to be subjected to the compelling governmental interest test and as we have indicated above, the zoning action here is clearly not in violation of the Civil Rights Acts or the Fair Housing Act. Like the respondents, ASPO has failed to set forth any specific provision of the statute which it contends has been violated nor any specific act which falls within the prohibitions of the statute. The action of the Village does not have the effect of discriminating on the basis of race and it is not subject to strict scrutiny nor the compelling governmental interest criteria.

Unlike *Black Jack,* the respondents totally failed to establish a prima facie case by demonstrating a racially discriminatory effect. In fact, the trial court specifically found to the contrary. Unlike *Black Jack,* the evidence in this record clearly showed a devaluation of adjacent property values and a violation of the integrity of the Zoning Ordinance.

ASPO repeatedly asserts that the compelling interest test is to be applied and insists that the interests put forth by the

Village were not sufficient. This constant reversion to the compelling interest test simply reflects the failure on the part of the amicus to understand what this Court has repeatedly said, *i.e.*, that there is no fundamental constitutional right of access to any particular kind of housing, and therefore the compelling interest test does not apply.

This case of course does not involve a "holding zone." It involves a single-family district which is part of the well-established area in which it finds itself. The single-family classification is a realistic one, totally in keeping with the established land uses in the area. Although ASPO believes that the buffer plan had not been applied consistently, the trial court after hearing the evidence held otherwise. The nature of the project here is high density, ranging between 12 and 15 units to the acre, more than three times the established density in the area. ASPO cites two dissenting members of the Plan Commission and ignores the majority of the Plan Commission and the six members of the Village Board who in fact found that this high density multiple-family development was spot zoning and totally inconsistent with the surrounding area.

ASPO's conclusion that this proposal would not so seriously disrupt the character of the area as to destroy the integrity of the comprehensive zoning plan simply indicates an ignorance not only of the specific facts of this case as revealed by the evidence, but betrays an abysmal ignorance of basic city planning principles.

ASPO is quick to say that the neighboring property owners are not entitled to the protection of the Zoning Ordinance and should be prepared to accept a five to ten per cent decrease in their values simply because, in ASPO's judgment, the preservation of the property rights is not a compelling interest. The design and layout of the project does not insure that an adverse impact will be minimized. In fact, the evidence shows just the contrary. The evidence in this record is clear that the racial character of future inhabitants of Lincoln Green had nothing

to do with the detrimental effect that a multiple-family development would have on the surrounding area. We are not talking about a "premium" as justifying racial discrimination or perpetuation of segregated housing. Instead, we are talking about the entire purpose of zoning and planning—the purpose of insuring compatible development from a land use standpoint and the preservation of property values.

Contrary to the assertion of ASPO, this case is not concerned with racial discrimination. We are concerned with a development proposal that is in clear contradiction to an established and consistently followed policy of a community's comprehensive plan. What purports to be a brief filed on behalf of professional planners, on analysis turns out to be nothing but an ill-conceived polemic tract, by a misguided and totally uninformed group who know not whereof they speak.

CONCLUSION.

Based on the foregoing and on the matters suggested in our original brief, we respectfully suggest that the Court of Appeals for the Seventh Circuit erred in its decision and judgment. We respectfully pray that the judgment of the Court of Appeals be reversed and the decision of the trial court affirmed.

Respectfully submitted,

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